Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 01-1435

In the

Supreme Court of the United States

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,

Petitioner,

v.

DEBORAH ANNE WELLS,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT FILED MARCH 26, 2002
CERTIORARI GRANTED OCTOBER 1, 2002

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3/23/99	1	COMPLAINT and JURY TRIAL DEMAND (Cause Code: 42:12101) (Receipt # 409729) (summons issued to Defendant-thru Merritt S Yoelin, agent) (tely) [Entry date 03/24/99]
3/23/99	2	ORDER Setting Discovery Schedule discovery due 7/21/99 pretrial order due 8/20/99 (tely) [Entry date 03/24/99]
5/20/99	3	ANSWER [1-1] and COUNTER-CLAIM by Defendant Clackamas Gastroent against Plaintiff Deborah Anne Wells (tely) [Entry date 05/21/99]
6/2/99	4	RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING Rule 16 Conference via telephone for 9:15am on 8/5/99 (counsel notified) Court Rptr none (tely) [Entry date 06/03/99]
6/10/99	5	REPLY by Plaintiff Deborah Anne Wells to Defendants counterclaim [3-2] (tely) [Entry date 06/11/99]
7/8/99	6	NOTICE OF ADDRESS CHANGE by attorney Craig Crispin for Deborah Anne Wells (tely) [Entry date 07/12/99]
8/5/99	7	RECORD OF ORDER Of Telephone Rule 16 Conference by Judge Donald C. Ashmanskas ORDER extending discovery ddl to 10/22/99 & filing of dispositive motions ddl to 10/29/99. ORDER consent to trial before US Magistrate Judge is to be filed with the Court by 10/22/99. ORDER DEFERRING the lodging of the pretrial order until after the Court has rendered a decision on the dispositive motions (counsel notified) Court Rptr none (tely) [Entry

date 08/06/99] Edit date 06/07/00]

10/29/99 8 NOTICE OF FILING Motion for Summary Judgment by Defendant; (no certificate of service). (peg) [Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 9 MOTION by Defendant FOR SUMMARY JUDGMENT; (no certificate of service). (peg) [Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 10 MOTION by Defendant FOR SUMMARY JUDGMENT; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 11 MEMORANDUM IN SUPPORT of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg)[Entry date 11/01/99] [Edit date 11/01/99]

10/29/99 12 CONCISE STATEMENT OF MATERIAL FACTS in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 13 AFFIDAVIT of Timothy J. Resch, Esq. in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service).-(peg) [Entry date 11/01/99]

10/29/99 14 AFFIDAVIT of Bernice E. Thomas in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

10/29/99 15 AFFIDAVIT of Gale Dupell in Support of Defendant's MOTION FOR SUMMARY JUDGMENT [9-1], [10-1]; (no certificate of service). (peg) [Entry date 11/01/99]

11/1/99 16 RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] on the under advisement motion of 12/13/99. (counsel notified) (peg) [Entry date 11/02/99]

11/2/99 17 CERTIFICATE OF SERVICE of affidavit [15-1], affidavit [14-1], affidavit [13-1], statement [12-1], memorandum [11-1], MOTION FOR SUMMARY JUDGMENT [10-1] by Defendant (peg) [Entry date 11/03/99]

11/12/99 18 UNOPPOSED MOTION by Plaintiff FOR EXTENSION OF TIME to Respond to Defendant's Motion for Summary Judgment [10-1], [9-1]. (peg) [Entry date 11/15/99]

11/12/99 19 AFFIDAVIT of Craig A. Crispin in Support of Plaintiff's MOTION FOR EXTENSION OF TIME to Respond to Defendant's Motion for Summary Judgment [10-1], [9-1] [18-1]. (peg [Entry date 11/15/99]

11/15/99 20 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Plaintiff's MOTION FOR EXTENSION OF TIME to Respond to Defendant's Motions for Summary Judgment [10-1][9-1][18-1] as follows: Response due by 11/24/99. (counsel notified) (peg) [Entry date 11/16/99]

11/26/99 25 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Plaintiff's counsel's letter request for an extension of time to and including 11/26/99, in which to file their response to Defendant's motion for summary judgment. (counsel notified) (peg)

[Entry date 12/01/99]

11/29/99 21 MEMORANDUM by Plaintiff IN RESPONSE to Defendant's MOTION FOR SUMMARY JUDGMENT [10-1],[9-1]; Oral Argument Requested; Reply due 12/13/99. (peg) [Entry date 11/30/99]

11/29/99 22 AFFIDAVIT of Craig A. Crispin in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment [21-1]. (peg) [Entry date 11/30/99]

11/29/99 23 RESPONSE by Plaintiff to Defendant's Concise Statement of Material Facts [12-1]. (peg) [Entry date 11/30/99]

11/29/99 24 CERTIFICATE OF SERVICE of Plaintiff's Response [23-1], Affidavit [22-1], and Motion Response [21-1]. (peg) [Entry date 11/30/99]

11/29/99 26 RECORD OF ORDER by Judge Donald C. Ashmanskas DENYING as MOOT Defendant's MOTION FOR SUMMARY JUDGMENT [10-1] as it is a duplicate filing of docket entry [9-1]. ORDER: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] remains set on the Under Advisement Calendar of 12/13/99. (cnsl ntfd) (peg) [Entry date 12/01/99] [Edit date 12/01/99]

12/10/99 27 UNOPPOSED MOTION by Defendant FOR EXTENSION OF TIME to reply to Plaintiff's response to Defendant's Motion for Summary Judgment [9-1]. (peg) [Entry date 12/14/99]

12/10/99 28 AFFIDAVIT of Steven W. Seymour in Support of Defendant's UNOPPOSED MOTION FOR EXTENSION OF TIME to reply to Plaintiff's response to

Defendant's Motion for Summary Judgment [9-1] [27-1]. (peg) [Entry date 12/14/99]

12/10/99 29 CERTIFICATE OF SERVICE of Affidavit [28-1] and Motion [27-1] by Defendant. (peg) [Entry date 12/14/99]

12/20/99 30 REPLY TO Plaintiffs RESPONSE by Defendant Clackamas Gastroent re MOTION FOR SUMMARY JUDGMENT [9-1]; o/a requested (tely) [Entry date 12/22/99]

12/20/99 31 RECORD OF ORDER by Judge Donald C. Ashmanskas GRANTING Defendant's unopposed MOTION FOR EXTENSION OF TIME to 12/20/99 in which to reply to Plaintiff's response to Defendant's Motion for Summary Judgment [9-1] [27-1]; ORDER: RESETTING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] from the 12/13/99 calendar to the oral argument calendar of 9:00 AM on 1/31/00. (counsel notified) (Court Rptr: none) (peg) [Entry date 12/27/99]

1/26/00 32 RECORD OF ORDER by Judge Donald C. Ashmanskas: STRIKING Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] from the 1/31/00 motion calendar; it will be reset upon compliance with LR 7. (counsel notified) Court Rptr: none (peg) [Entry date 01/27/00]

2/7/00 33 SUPPLEMENTAL CERTIFICATION OF COMPLIANCE by Defendant with LR 7.1 (peg) [Entry date 02/08/00]

2/7/00 34 RECORD OF ORDER by Judge Donald C. Ashmanskas SETTING defendants' MOTION FOR SUMMARY JUDGMENT [9-1] on oral argument calendar of 9:00

		AM on 3/20/00 (counsel notified) Court Rptr: none (peg) [Entry date 02/10/00]
12/10/00	35	RETURN OF SERVICE EXECUTED upon Defendant Clackamas Gastroenterology Assocciation, P.C. on 4/20/99 (peg)[Entry date 02/14/00]
3/20/00	36	RECORD OF PROCEEDINGS before Judge Donald C. Ashmanskas; ORDER: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] is taken under advisement this day, 3/20/00; ORDER: Findings and Recommendation to follow. (counsel notified) Court Reporter: Deirdre Neal (tape 522) (peg) [Entry date 03/22/00]
3/22/00	37	FINDINGS AND RECOMMENDATION by Judge Donald C. Ashmanskas as follows: Defendant's MOTION FOR SUMMARY JUDGMENT [9-1] with respect to plaintiff's First Claim for Relief, SHOULD BE GRANTED. The remainder of defendant's summary judgment motion SHOULD BE DENIED as moot. Plaintiff's Second and Third Claims for Relief SHOULD BE DISMISSED without prejudice. s/DCA 3/22/00 (cnsl ntfd); Due date for filing objections: 4/5/00 Due date for to objections: 4/19/00 (peg)
4/5/00	38	OBJECTIONS to FINDINGS & RECOMMENDATION [37-1] by Plaintiff (peg)
4/5/00	39	CERTIFICATE OF SERVICE re: Objections [38-1] to the F&R by Plaintiff (peg)
4/19/00	40	Response by Defendant to Plaintiff's Objections to Findings and

		Recommendation (peg)
4/19/00	41	CERTIFICATE OF SERVICE of Response to Objections [40-1] to Findings and Recommendation by Defendant (peg)
5/2/00	42	MINUTES OF ORDER by Judge Donald C. Ashmanskas REFERRING the Findings and Recommendation [37-1], the Objections [37-1] and the Response to the Objections [40-1] to the Honorable Owen M. Panner for review. (peg) [Entry date 05/04/00]
5/5/00	43	ORDER by the Honorable Owen M. Panner as follows: Plaintiff has filed timely objections and Defendant has filed a response to those objections. I have given the file of this case a de novo review. I ADOPT Magistrate Ashmanskas' Findings and Recommendation [37-1]. Defendant's Motion for Summary Judgment [9-1], with respect to plaintiff's First Claim for Relief, is granted. The remainder of defendant's summary judgment motion is denied as moot. Plaintiff's Second and Third Claims for Relief are dismissed without prejudice. IT IS SO ORDERED. Signed 5/5/00 (counsel notified) (peg) [Entry date 05/08/00]
5/23/00	44	RECORD OF ORDER by Judge Donald C. Ashmanskas: Telephone Status/Scheduling Conference set for 11:30 AM on 5/31/00 (counsel notified) Court Rptr: none (peg) [Entry date 05/25/00]
5/31/00	45	RECORD OF ORDER by Judge Donald C. Ashmanskas STRIKING the

Telephone Status Conference set for 5/31/00. (counsel notified) Court Rptr: none (peg) [Entry date 06/02/00]

6/2/00 46 JUDGMENT OF DISMISSAL: Consistent with the Order [43-1] of this court, filed 5/5/00, adopting the Findings and Recommendation [37-1] by US Magistrate Judge Donald C. Ashmanskas, filed 3/22/00, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice. Pending motions, if any, are DENIED as moot. Signed 5/31/00 by the Honorable Owen M. Panner; Microfilmed 6/2/00. (counsel notified) (peg)

6/2/00 47 NOTICE OF APPEAL to Court of Appeals by Plaintiff Deborah Anne Wells from the Judgment [46-2] which ADOPTED the Magistrate's Findings and Recommendation [37-1] that GRANTED in part Defendant's Motion for Summary Judgment Receipt # 430744 (peg) [Entry date 06/05/00]

6/2/00 48 REPRESENTATION STATEMENT by Plaintiff with attached Civil Appeals Docketing Statement. (peg) [Entry date 06/05/00]

6/7/00 -- NOTIFICATION OF APPEAL mailed to Court of Appeals For the document and docket sheet re: Appeal [47-1] filed on 6/2/00 by Plaintiff Deborah Anne Wells.. (peg)

6/16/00 49 TRANSCRIPT DESIGNATION AND ORDERING FORM for date(s) 3/20/00 re appeal filed 6/2/00 [47-1] (tely)

7/17/00 50 TRANSCRIPT of PROCEEDINGS HAD 3/20/00 of Motion for Summary

Judgment before Judge Donald C. Ashmanskas appeal [47-1] court reporter: Patricia Morgan (tely) [Entry date 07/18/00]

8/21/00 51 CERTIFICATE OF RECORD transmitted to US Court of Appeals for the Ninth Circuit re: Appeal by Plaintiff filed 6/2/00 [47-1] (wri)

CLERK'S RECORD on appeal (entire original file and transcripts) transmitted to US Court of Appeals for the Ninth Circuit regarding [47-1] Court of Appeals Number 00-35545. (cid)

MANDATE/JUDGMENT from USCA REVERSING AND REMANDING the Decision of the District Court [Appeal [47-1] (cid) [Entry date 12/28/01]

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

COMPLAINT
(Americans with Disabilities Act; ORS 659.436-449;
Wrongful Discharge)

JURY TRIAL DEMANDED

NATURE OF THE ACTION

1. This is an action under Title I of the Americans with Disabilities Act of 1990.

Title I of the Civil Rights Act of 1991 to correct unlawful employment practices on the basis of disability, to vindicate plaintiff's rights and the rights of other qualified people with disabilities to fair treatment and equal opportunity, and to make plaintiff whole. Plaintiff is a qualified individual with a physical impairment, which substantially limits her in one or more major life activities. Defendant discriminated against plaintiff in

the terms and conditions of her employment, refused to accommodate plaintiff's disability, and discharged plaintiff from her position of employment because of her disability.

2. This is also an action for violation of the Oregon State Disability Discrimination law, ORS 659.436-.449, pursuant to the court's supplemental jurisdiction.

JURISDICTION AND VENUE

3. This court has jurisdiction over the subject matter of this complaint pursuant to 28 U.S.C.§ 1331. This action is authorized and instituted pursuant to Section 107(a) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12 117(a) and pursuant to Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981(A).

4. The court has jurisdiction over plaintiff's state law claims set forth in this complaint pursuant to its supplemental jurisdiction to hear related state law claims under 28 U.S.C. § 1367(a). Both the federal and state claims alleged herein arose from a common nucleus of operative fact, the state action is so related to the federal claim that they form part of the same case or controversy, and the actions would ordinarily be expected to be tried in one judicial proceeding.

5. The employment practices alleged herein were committed in the District of Oregon.

PARTIES

6. Plaintiff Deborah Anne Wells is a resident and citizen of the State of Oregon.

7. Defendant Clackamas Gastroenterology Associates, P.C. is an Oregon corporation of licensed physicians.

8. Defendant employs and has employed during the relevant periods more than 15 employees. At all material times defendant was and is an employer within the meaning of 42 U.S.C.§ 1211 1(5)(A), ORS 659.400 and ORS 659.0 10.

PROCEDURAL REQUIREMENTS

9. Plaintiff has filed charges of unlawful employment practices with the Oregon Bureau of Labor and Industries, Civil Rights Division ("CRD"), and complaints with the Equal Employment Opportunity Commission ("EEOC") raising the issues complained of herein.

10. Plaintiff has received a Notice of Private Right of Action from the Oregon CRD and a Notice of Right to Sue from the EEOC authorizing plaintiff to commence a civil action. Plaintiff has timely filed her complaint following her receipt of notices authorizing her to bring these actions.

FACTUAL ALLEGATIONS

11. Plaintiff was employed by defendant on a part time basis in 1984 and subsequently on a full time basis beginning in 1986 as bookkeeper in defendant's Oregon City, Oregon office. Plaintiff worked in this position until her involuntary termination on or about May 12, 1997.

12. In February 1997, plaintiff received a diagnosis of mixed connective tissue disorder and advised her employer of the diagnosis.

13. Due to her mixed connective tissue disorder, plaintiff suffers severe reactions to the immune system, circulatory system and internal organs and symptoms including muscle weakness, shortness of breath, fatigue, high blood pressure, trouble swallowing due to esophageal narrowing, and hardening of the skin and veins. The disease causes a risk of vein collapse.

14. Plaintiff at all material times, was a disabled person in that she suffers from a chronic condition, a physical impairment affecting one or more of her bodily systems, including her circulatory, musculature, hematic, skin, and immune systems.

15. Plaintiff's physical impairment causes a substantial limitation on one or more major life activities, including caring for herself performing manual tasks, walking, breathing, eating and working, in that she is significantly restricted as to the condition, manner or duration under which she can perform such major life activities as compared to the condition, manner or duration under which the average person in the general population can perform those same major life activities.

16. Despite her physical impairment, plaintiff was able to the essential functions of her job with reasonable accommodation.

17. Defendants regarded and treated plaintiff as a person with an impairment that substantially limited one or more major life activities. Plaintiff's ability to perform the essential functions of her position with defendants

was limited as a result of the attitude of defendant toward her impairment.

18. As a result of her disability, plaintiff began to suffer increasing fatigue in January 1997 and requested defendant to provide her assistance with her increasing workload and to change her hours of work to allow her to leave at 3:30 p.m.

19. In early March 1997, plaintiff again requested that her employer hire some part time help to assist her or otherwise to relieve her excessive workload, but defendant refused to provide the requested assistance.

20. In late March 1997, defendant reassigned plaintiff to receptionist duties in its Milwaukie, Oregon office for four days per week. Plaintiff protested the transfer and advised defendant of her inability to perform in the new position due to her disability. Plaintiff requested reasonable accommodation in connection with the reassignment, but defendant refused.

21. Plaintiff attempted to perform her reassigned duties, but her symptoms worsened during April 1997 due to defendant's failure to provide reasonable accommodation. On or about April 23, 1997, plaintiff again sought reasonable accommodation regarding her assigned work location and work duties, and defendant responded by reassigning her to yet another, less suitable location.

22. Plaintiff's doctor put her on medical leave on April 25, 1997 and plaintiff timely notified defendant. Defendant terminated plaintiff's employment on May 12. 1997, while on medical leave.

FIRST CLAIM FOR RELIEF

(Title I of the Americans with Disabilities Act)

23. Plaintiff incorporates by reference the allegations of paragraphs 1 through 22.

24. Plaintiff was qualified for her position of employment with defendant and was able to and did perform the essential functions of such position, except as caused by defendant's failure to provide reasonable accommodation.

25. Upon defendant's learning of plaintiff's impairment and disability with a chronic disease, defendant began subjecting plaintiff to adverse terms and conditions of employment.

26. Plaintiff repeatedly requested reasonable accommodations necessary to perform the essential functions of her position.

27. Plaintiff's requested accommodations were reasonable and readily available to defendant, but defendant refused to provide them or otherwise to accommodate the effects of plaintiff's disability.

28. In response to plaintiff's requests for accommodation, defendant retaliated against plaintiff by reassigning her to less desirable and more physically demanding assignments.

29. When on April 23, 1997 plaintiff was reassigned to the Tualatin office, she advised defendant that the long drive and scheduled work hours would be too difficult for her due to her disability. Defendant responded by suggesting to plaintiff that she quit.

30. On April 24, 1997, plaintiff had to leave work to consult her doctor concerning an elevated heart rate and elevated blood pressure.

31. Plaintiff's doctor authorized plaintiff to remain off work on medical leave from April 25 to May 12, 1997, and plaintiff notified defendant accordingly.

32. On May 6, 1997, defendant advised plaintiff by letter that her medical absence was causing a "hardship" on the company and that plaintiff would be terminated on May 12, 1997 should she not return to work on that day.

33. On May 12, 1997, plaintiff's doctor authorized plaintiff an additional period of medical leave, and plaintiff notified defendant.

34. Defendant terminated plaintiff on May 12, 1997 for the purported reason that plaintiff failed to report to work. Such reason was a pretext for illegal discrimination.

35. Defendant subjected plaintiff to adverse employment conditions due to her disability.

36. Defendant's termination of plaintiff's employment was due to her disability.

37. As a result of defendant's conduct, plaintiff has suffered lost wages plus benefits of employment from the date of her termination through the date of filing, and will continue through the date of trial to suffer lost wages and benefits in an amount to be established at trial.

38. Plaintiff is entitled to be reinstated to employment by defendant. If reinstatement is not feasible, plaintiff is entitled to an award for damages for future lost wages and benefits of employment, and lost earning capacity.

39. Plaintiff is entitled to a permanent injunction enjoining defendant, its owners, officers, management personnel, employees, agents, successors, and assigns, and all persons in active concert or participation with defendant, from engaging in any employment practice which discriminates on the basis of disability.

40. As a further result of defendants' intentional acts alleged herein, plaintiff suffered severe emotional distress, mental pain and anguish, embarrassment, loss of dignity and self- esteem, sleeplessness, nausea and headaches, humiliation, and loss of enjoyment of life for which plaintiff should recover the sum of $500,000, or such amount as may be available under applicable law.

41. Defendant's acts were done intentionally with an improper, abusive, discriminatory, and retaliatory motive, and with reckless indifference to plaintiff's state and federally protected rights. Such conduct should not be tolerated by this society, and punitive damages in the amount of $500,000, or as otherwise fixed by a jury and available under applicable law, should be awarded to punish defendants and deter such conduct in the future.

42. Plaintiff is entitled to an award of attorney's fees, expert witness fees and costs incurred herein, pursuant to one or more of the following: 42 U.S.C. § 12205, ORS 659.121, ORS 20.107.

SECOND CLAIM FOR RELIEF

(Unlawful Employment Practices ORS 659.436-449)

43. Plaintiff incorporates by reference the allegations of paragraphs 1 through 42.

44. Defendant's acts as alleged herein are motivated by and due to plaintiff's disability and constitutes unlawful employment practices under ORS 659.436-449.

THIRD CLAIM FOR RELIEF

(Wrongful Discharge)

45. Plaintiff incorporates by reference the allegations of paragraphs 1-41 and 44.

46. Plaintiff resisted and protested defendant's discriminatory treatment of her related to her disability and requests for accommodation.

47. Defendant's termination of plaintiff was in retaliation for plaintiffs pursuit of her rights related to her role as an employee, which rights are of important public interest, and for which plaintiff should recover from defendant as alleged herein.

48. Plaintiff is entitled to recover her costs of suit and her reasonable attorney fees, costs and expert witness fees pursuant to ORS 20.107.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests the court to:

49. Assume jurisdiction over each of the causes set forth herein.

50. Grant a permanent injunction enjoining defendant, its owners, officers, management personnel, employees, agents, successors, and assigns, and all persons in active concert or participation with defendant, from engaging in any employment practice which discriminates on the basis of disability or in anticipation of the use of protected medical leave, on such terms as the court may direct.

51. Order defendant to carry out and institute policies, practices and programs providing for equal employment opportunities to qualified individuals with disabilities and which affirmatively eradicate the effects of past and present unlawful employment practices, on such terms as the court may direct.

52. Order defendant to reinstate plaintiff to her position of employment or if such reinstatement is not feasible, to award plaintiff compensation for lost earning capacity and future earnings and benefits of employment in such amounts as are determined at trial.

53. Order defendant to make plaintiff whole by compensating her for past and future pecuniary losses, including expenses, lost past earnings and benefits of employment, and medical and health care expenses caused by plaintiff's loss of employment, all in such amounts as are determined at trial.

54. Order defendant to make plaintiff whole by providing compensation for nonpecuniary losses, including physical and emotional pain and suffering, mental anguish, humiliation, and embarrassment, and loss of enjoyment of life in amounts as are determined at trial.

55. Order defendant to pay plaintiff punitive damages

in an amount to be determined at trial.

56. Award plaintiff her costs of suit and her reasonable attorney fees, costs and expert witness fees pursuant to 42 U.S.C. § 12205. ORS 659.121. and ORS 20.107.

57. Order defendant to pay prejudgment and postjudgment interest on all amounts due to plaintiff as a result of this action.

58. Order such further or alternative relief in favor of plaintiff as the court deems appropriate.

JURY TRIAL DEMAND

Plaintiff demands a jury trial on all questions of fact or combined questions of law and fact raised by this complaint.

CRISPIN & ASSOCIATES

By:_____
Craig A. Crispin, OSB No. 82485
Telephone: 503.224.2007
Facsimile: 503.224.0517
Of Attorneys for Plaintiff

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

ANSWER, AFFIRMATIVE DEFENSE AND COUNTER-CLAIM

As an answer to Plaintiff's Complaint, Clackamas Gastroenterology Associates, P.C., Defendant. admits, denies and alleges as follows:

1. Defendant admits paragraphs 3 and 7 of Plaintiff's Complaint.

2. Defendant denies paragraphs 6, 10, 12, 13, and 30 of Plaintiff's Complaint for lack of information and belief.

3. As to paragraph 1 of Plaintiff's Complaint, Defendant admits that the Plaintiff's Complaint includes an action under Title I of the Americans with Disabilities Act of 1990 and Title I of the Civil Rights Act of 1991 and denies the balance of paragraph 1.

4. As to paragraph 2 of Plaintiff's Complaint, Defendant admits that Plaintiff's Complaint contains a claim for violation of the Oregon State Disability Discrimination Law, ORS 659.436-499, and denies the balance of paragraph 2.

5. As to paragraph 9 of Plaintiff's Complaint, Defendant admits that Plaintiff filed charges of unlawful employment practices with the Oregon Bureau of Labor and Industries, Civil Rights Division and complaints with the Equal Employment Opportunity Commission as to Americans with Disabilities Act and the Civil Rights Act of 1991, and denies the balance of paragraph 9.

6. As to paragraph 22 of Plaintiff's Complaint, Defendant admits that the Plaintiff was placed on medical leave on April 25, 1997 and denies the balance of paragraph 22.

7. As to paragraph 31 of Plaintiff's Complaint, Defendant admits that it received a facsimile transmission from Valley View Medical Clinic advising that Plaintiff had no evidence of a contagious or infectious disease and was physically able to return to work, school and sports, and that time loss was authorized from April 25 through May 12, 1997, and denies the balance of paragraph 31.

8. As to paragraph 32 of Plaintiff's Complaint, Defendant admits that it sent a letter to the Defendant dated May 6, 1997, the content of which speaks for itself, and denies the balance of paragraph 32.

9. Defendant denies all other allegations of Plaintiff's Complaint.

AFFIRMATIVE DEFENSE TO PLAINTIFF'S FIRST AND

SECOND CLAIMS

10. Defendant made a good faith effort to identify and make reasonable accommodation for any alleged disability of Plaintiff.

COUNTERCLAIMS FOR ATTORNEY'S FEES

11. Defendant is entitled to an award of attorney's fees, expert witness fees and costs incurred herein, pursuant to one or more of the following: 42 USC § 12205 and ORS 20. 107.

WHEREFORE, Defendant prays for judgment dismissing Plaintiff's Complaint and awarding its attorney's fees, expert witness fees, costs and disbursements incurred herein.

DATED this _____day of May, 1999.

BY_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing ANSWER, AFFIRMATIVE DEFENSE AND COUNTERCLAIM on the following:

Craig A. Crispin
CRISPIN & ASSOCIATES
300 Jefferson Station
1230 SW First Avenue
Portland, OR 97204

by mailing a true and correct copy thereof. I further certify that said copy was contained in a sealed envelope with postage prepaid, addressed to the last known address as above stated and deposited in the post office at Portland, Oregon, on the 19th day of May, 1999.

By_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendant

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

PLAINTIFF'S REPLY
To Defendant's Counterclaim

Plaintiff Deborah Anne Wells, in reply to defendant Clackamas Gastroenterology Associates, P.C.'s counterclaim, states as follows:

REPLY TO COUNTERCLAIM

1.

Plaintiff denies that defendant is entitled to recover attorney fees, expert witness fees or costs pursuant to 42 USC § 12205, ORS 20.107, or by any other means.

2.

Defendant's counterclaim is without foundation in fact or law, is asserted in bad faith for oppressive reasons,

and plaintiff is entitled to appropriate remedies.

3.

Defendant is entitled to no relief under its counterclaim.

CONCLUSION

Having fully replied to defendant's counterclaim, plaintiff prays for judgment in her favor dismissing the counterclaim asserted against her and awarding her costs and reasonable attorney fees.

CRISPIN & ASSOCIATES
By:_____
Craig A. Crispin, OSB NO. 82485
Of Attorneys for Plaintiff
Telephone: 503.224.2007
CERTIFICATE OF SERVICE

I certify that the foregoing Plaintiff's Reply to Defendant's Counterclaim was served on:

Steven W. Seymour
SAMUELS Y0ELIN KANTOR SEYMOUR & SPINRAD LLP
4640 SW Macadam Avenue, Suite 200
Portland, OR 97201

by mailing a true copy thereof, addressed as above, contained in a sealed envelope with postage prepaid,

and this date deposited in the post office in Portland, Oregon.

DATED: June 10th 1999.

By:_____
Craig A. Crispin, OSB No. 82485
Of Attorneys for Plaintiff
Telephone: 503.224.2007

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

MOTION FOR SUMMARY JUDGMENT BY DEFENDANT

Defendant, by and through Steven W. Seymour of Samuels Yoelin Kantor Seymour & Spinrad LLP, its attorneys, hereby moves the Court to enter Summary Judgment for Defendant, in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the grounds that the pleadings, Affidavits, and Exhibits A and B show that there is no genuine issue of material fact and that the Defendant is entitled to a judgment as a matter of law.

DATED this _____day of October, 1999.

By:_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendants

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTION

Pursuant to LR 56.1 (a)(2), Defendant submits the following Statement of Material Facts as to which it contends there is no genuine issue, and which entitle Defendant to summary judgment of dismissal with prejudice.

1. Defendant is a professional corporation, specializing in gastroenterology. Defendant's main office is in Oregon City. Defendant subleases space in Milwaukee (the Milwaukee satellite office), and has a location in Tualatin (the endoscopy center). (Exhibit B, Dupell Deposition, pp 51, 58).

2. Defendant did not employ 15 or more employees for at least 20 weeks in either 1996 or 1997. (Dupell Affidavit, p. 2).

3. Dr. Robert Wollmuth, Dr. Jon Mason, Dr. William Ferrin, and Dr. Michael Sheffield are shareholders and

directors of Defendant, actively participate in the management of Defendant's business, and share in the profits from Defendant's business. (C, Dupell Affidavit, p. 2).

4. Defendant employed Plaintiff as a bookkeeper in Defendant's gastroenterology medical practice. (Exhibit A, Wells Deposition, p. 12).

5. Plaintiff's duties included bookkeeping, patient billing and collections, and coverage assignments, as described in more detail on a document titled "Job Description: Bookkeeper and Patient Collections." Such duties constituted the essential functions of Plaintiff's job. (Exhibit A, Wells Deposition, p. 14; Exhibit A, Wells Deposition ex. 3).

6. Plaintiff participated in, and had an interactive role in the drafting process of her job description. (Exhibit B, Dupell Deposition, pp. 14-15).

7. Plaintiff was unable, without reasonable accommodation, to perform the essential functions of her job as a bookkeeper. (Exhibit A, Wells Deposition, p. 24).

8. Plaintiff's replacement as a bookkeeper, Ms. Bernice Thomas, is performing the same duties as Plaintiff, in addition to some extra functions that Plaintiff did not perform. (Thomas Affidavit, p. 2).

9. Plaintiff's only requested accommodation was that Defendant hire additional staff to assist with the essential functions of Plaintiff's job. (Exhibit A, Wells Deposition, pp. 24, 79).

10. Hiring an additional person to assist Plaintiff with

her duties would constitute an undue hardship to Defendant. (Dupell Affidavit, p. 3).

11. On April 24, 1997, Defendant offered Plaintiff a transfer to Defendant's Tualatin office. Defendant's offer of a transfer was a reasonable accommodation for Plaintiff's disability. (Exhibit A, Wells Deposition, pp. 44-45).

12. The patient coordinator/receptionist job at Defendant's Tualatin office was easier and less stressful than Plaintiff's bookkeeper job. (Exhibit B, Dupell Deposition, p. 51).

13. Plaintiff rejected Defendant's offer of a transfer to Defendant's Tualatin office. Plaintiff rejected the transfer because the receptionist position was humiliating, and because she did not want to commute to Tualatin. (Exhibit A, Wells Deposition, pp. 46-48)

14. Plaintiff left work on April 24, 1997, never returned to work after that date, and never offered to return to work. (Exhibit A, Wells Deposition, pp. 66-67).

15. Defendant's personnel policy provides that two consecutive unexcused absences will be treated as a voluntary termination on the part of the employee. (Exhibit A, Wells Deposition, ex. 10).

16. Plaintiff's physician provided Plaintiff with a medical release, authorizing her leave from work from April 28, 1997 through May 12, 1997. (Exhibit B, Dupell Deposition, ex. 113).

17. Defendant was not aware, at any time in May or June of 1997, that Plaintiff received a medical release extending beyond May 12, 1997. (Exhibit B, Dupell

Deposition, p. 41)

18. Defendant sent a letter to Plaintiff on May 6, 1997, which Plaintiff received on or about May 8, 1997. This letter provided information to Plaintiff about her disability insurance. Defendant also inquired as to whether Plaintiff would be returning to work on May 12, 1997. (Exhibit A, Wells Deposition, p. 78; Exhibit A, Wells Deposition ex. 13).

19. Plaintiff did not return to work on either May 12, May 13, May 14, or May 15,1997. (Exhibit B, Dupell Deposition, p. 67).

20. Plaintiff filed a disability claim with Unum Insurance company. (Exhibit A, Wells Deposition, p. 74; Exhibit A, Wells Deposition ex. 12).

21. Plaintiff appealed Unum Insurance Company's denial of her disability claim by sending Unum a letter dated August 13, 1997. In this letter, Plaintiff state that she was unable to work at all. (Exhibit A, Wells Deposition, p. 91-92; Exhibit A, Wells Deposition ex. 17).

22. Plaintiff's attending physician, Dr. Michelle Adamcak, wrote a letter dated August 7, 1997, which stated "At this time, [Plaintiff] is unable to do any work, even work that is sedentary." (Exhibit A, Wells Deposition, p. 96; Exhibit A, Wells Deposition ex. 18).

All exhibits referred to herein are attached to Defendant's Memorandum in Support of its Motion for Summary Judgment. For clarity, all page numbers refer to the deposition transcript page number, or the affidavit page number.

DATED this_____ day of October, 1999.

By:_____
Steven W. Seymour, OSB #75332
Of Attorneys for Defendants

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

AFFIDAVIT OF GALE DUPELL IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Gale Dupell, being first duly sworn, depose and say as follows:

1. I became employed as the Administrator for Clackamas Gastroenterology Associates, P.C. on August 8, 1994, and have been so employed from that date to the present.

2. I graduated with a Bachelor of Arts in Public Administration from Washington State University in 1974. I received a Masters of Business Administration from the University of Portland in 1992. I have previously been employed as a cost accountant for First Interstate Bank; I was a case mix manager for Legacy Health Systems; I was the administrator of anesthesiology for Oregon Health Sciences University from approximately 1989 until August, 1994.

3. I had a temporary employee review the payroll records for Clackamas Gastroenterology Associates, P.C. for calendar years 1996 and 1997. Attached is a true and correct copy of a spreadsheet I had prepared, which summarizes the total number of employees for each week in calendar years 1996 and 1997.

4. The work week for Clackamas Gastroenterology Associates, P.C. is Monday through Friday. The attached spreadsheet demonstrates that Clackamas Gastroenterology Associates, P.C. had 15 employees for 10 weeks in calendar year 1996, and 8 weeks in calendar year 1997.

5. Since July, 1994, and for all material times relevant to the above entitled proceeding, the shareholders and directors of Clackamas Gastroenterology Associates, P.C. were; Robert L. Wollmuth, M.D., S. Jon Mason, M.D., William M. Ferrin, M.D., and Michael F. Sheffield, M.D.

6. The shareholders and directors participate in the management and operations of the medical practice of Clackamas Gastroenterology Associates, P.C., and attend monthly board meetings. The shareholders and directors share profits from the professional corporation by an annual bonus.

7. For all material times relevant to the above entitled proceeding, my duties as Administrator included supervising all personnel at Clackamas Gastroenterology Associates, P.C. I am responsible for management of personnel, including hiring and firing decisions in conjunction with input from the board of directors.

8. I have reviewed the Job Description: Bookkeeper

and Patient Collections, marked Exhibit 3 for the Wells Deposition. I prepared this Job Description, after receiving input from Deborah Wells on the job duties and responsibilities for the bookkeeper position.

9. I was responsible for assigning office personnel to occasionally cover the patient coordinator/receptionist position at the Milwaukee satellite office. I decided to assign Deborah Wells to cover the receptionist position at the satellite office because she could perform her other duties, like patient collections, while at that position. While Ms. Wells was covering the satellite office, I took over her posting duties, a significant portion of her job.

10. I was responsible for the decision to offer Deborah Wells a transfer to the Tualatin satellite office. I made this decision because Ms. Wells was not able to handle her duties as a bookkeeper. I offered Ms. Wells the transfer to the Tualatin office because that job (patient coordinator/receptionist) was the least stressful position available with Clackamas Gastroenterology Associates, P.C.

11. I did not hire any additional staff for the bookkeeper position because the increased cost of an additional person was not a viable option, given the nature of the duties performed by the bookkeeper.

12. I was responsible for hiring Bernice Thomas as our bookkeeper, on May 19, 1997. I am responsible for supervising Ms. Thomas, and am familiar with her duties and functions. I am aware that Ms. Thomas is able to perform all of the duties and functions listed on the Job Description: Bookkeeper and Patient Collections. Ms. Thomas is actually performing more duties than those listed on the Job Description. On occasion, I have

assigned Ms. Thomas to cover the patient coordinator/receptionist position at our Milwaukee satellite office.

13. On May 6, 1997, I sent a letter to Ms. Wells regarding her return to work at Clackamas Gastroenterology Associates, P.C. At the time, I misunderstood her medical release, and believed that Ms. Wells was authorized to return to work on May 12, 1997, when in fact, she was actually authorized to return on May 13, 1997. I never received any response, either written or oral, from Ms. Wells to my May 6, 1997 letter. When Ms. Wells did not contact me, or show up for work on May 12 through May 15, 1997, I understood her to have voluntarily resigned, in accordance with our unexcused absence policy.

14. I have reviewed the letter from Dr. Adamcak, dated April 28, 1997, and marked as Dupell Deposition Exhibit 115. I received this letter on May 15 or May 16, 1997. I did not see this letter at any time prior to May 15, 1997.

15. Ms. Wells was not terminated because of her disability. I am familiar with Clackamas Gastroenterology Associates, P.C's personnel policy, marked as exhibit 10 for the Wells Deposition. In accordance with that personnel policy, Ms. Wells was considered to have voluntarily terminated by abandoning her job.

16. I make this Affidavit of my own knowledge and in support of Defendant Clackamas Gastroenterogy Associates, P.C.'s Motion for Summary Judgment.

DATED this 28th day of October, 1999.

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W1	96	2	0	5	5	5	5	0	5	0	5	0	5	0	0
W2	96	1	0	5	5	5	5	1	5	0	5	0	4	0	2
W3	96	3	0	5	5	5	5	0	5	0	5	0	3	0	2
W4	96	0	0	5	5	5	5	2	5	0	5	0	4	0	2
W5	96	2	0	5	5	5	5	1	5	0	5	0	4	0	2
W6	96	4	0	4	5	5	5	1	5	0	5	0	3	0	2
W7	96	3	0	5	5	5	5	1	5	0	5	0	4	0	1
W8	96	2	0	4	3	4	5	0	5	0	5	0	4	0	2
W9	96	2	1	4	0	5	5	2	5	0	5	0	3	0	1
W10	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W11	96	3	5	5	0	5	5	0	5	0	5	0	4	0	0
W12	96	2	5	4	0	5	5	0	5	0	5	0	4	0	0
W13	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0

Gale Dupell
SUBSCRIBED AND SWORN to before me this 28th day of October, 1999.

Notary Public for Oregon

(Certificate or affidavit of service omitted in printing).

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W30	96	2	5	5	0	5	5	2	5	0	5	5	4	0	0
W31	96	2	5	5	0	5	5	1	5	0	5	5	1	0	0
W32	96	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W33	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W34	96	2	5	5	0	5	5	0	5	0	5	5	3	0	0
W35	96	1	5	5	0	5	5	2	5	0	5	5	1	0	0
W36	96	1	5	5	0	5	5	0	5	0	5	5	5	0	0
W37	96	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W38	96	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W39	96	3	5	5	0	5	5	0	5	0	5	5	4	0	0
W40	96	2	5	5	0	5	5	1	5	0	5	5	4	0	0
W41	96	2	5	5	0	5	5	1	5	0	5	5	4	0	0
W42	96	1	5	5	0	5	5	0	5	0	5	5	5	0	0

W14	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W15	96	1	5	5	0	5	5	1	5	0	5	0	4	0	0
W16	96	1	5	5	0	5	5	0	5	0	5	0	4	0	0
W17	96	2	5	5	0	6	5	1	5	0	5	0	4	0	0
W18	96	5	5	5	0	4	5	1	5	0	5	0	4	0	0
W19	96	2	5	5	0	5	5	1	5	0	5	0	4	0	0
W20	96	3	5	5	0	5	5	2	5	0	5	0	5	3	0
W21	96	1	5	5	0	5	5	0	5	0	5	3	2	5	0
W22	96	1	5	5	0	4	5	1	5	0	5	5	5	0	0
W23	96	3	5	5	0	5	5	1	5	0	5	5	4	5	0
W24	96	1	5	5	0	5	5	0	5	0	5	5	4	5	0
W25	96	1	5	5	0	5	5	0	5	0	5	5	5	5	0
W26	96	1	5	5	0	5	5	0	5	0	5	5	5	2	0
W27	96	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W28	96	3	5	5	0	5	5	1	5	0	5	5	5	0	0
W29	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0

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For CY 1996 and 1997
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No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W 59	97	3	5	5	0	5	5	0	5	0	5	5	5	0	0
W 60	97	3	5	5	0	4	5	1	5	0	5	5	4	0	0
W 61	97	2	5	5	0	5	5	0	5	0	5	5	3	0	0
W 62	97	4	5	5	0	5	5	0	5	0	5	5	5	0	0
W 63	97	1	5	5	0	5	5	0	4	0	5	5	4	0	0
W 64	97	1	5	5	0	5	5	0	4	2	5	5	5	0	0
W 65	97	0	5	5	0	5	5	0	5	2	5	5	4	0	0
W 66	97	5	5	5	0	5	5	0	5	1	5	5	5	0	0
W 67	97	1	5	5	0	5	5	0	5	1	5	5	4	0	0
W 68	97	1	5	5	0	5	5	0	5	2	5	5	5	0	0
W 69	97	1	5	5	0	4	5	2	5	2	5	5	4	0	0
W 70	97	1	5	5	0	5	5	0	5	1	5	5	4	0	0
W 71	97	3	5	5	0	5	5	0	5	2	5	5	4	0	0

W43	96	1	5	5	0	5	5	1	5	0	5	5	5	0	0
W44	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W45	96	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W46	96	2	5	5	0	4	5	0	5	0	5	5	4	0	0
W47	96	1	5	5	0	5	5	0	5	0	5	5	3	0	0
W48	96	3	5	5	0	5	5	0	5	0	5	5	4	0	0
W49	96	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W50	96	3	5	5	0	5	5	2	5	0	5	5	4	0	0
W51	96	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W52	96	4	5	5	0	5	5	0	5	0	4	5	4	0	0
W53	96&97	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W54	97	4	5	5	0	5	5	1	5	0	5	5	4	0	0
W55	97	2	5	5	0	5	5	0	5	0	5	5	4	0	0
W56	97	1	5	5	0	5	5	1	5	0	5	5	4	0	0
W57	97	1	5	5	0	4	5	1	5	0	5	5	5	0	0
W58	97	1	5	5	0	5	5	0	5	0	5	5	4	0	0

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For CY 1996 and 1997
#REF!
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No. of Days Paid

		1	2	3	4	5	6	7	8	9	10	11	12	13	14
W 88	97	1	5	5	0	5	5	0	5	0	5	0	5	0	0
W 89	97	2	5	4	0	5	5	0	5	2	5	0	3	0	0
W 90	97	2	5	5	0	4	5	0	5	1	5	0	3	0	0
W 91	97	1	5	5	0	4	5	1	5	1	5	0	4	0	0
W 92	97	1	5	0	0	5	5	0	5	0	5	0	4	0	0
W 93	97	1	5	0	0	5	5	0	5	1	5	0	2	0	0
W 94	97	2	5	5	0	5	5	0	5	2	5	0	5	0	0
W 95	97	2	5	5	0	5	5	0	5	2	5	0	5	0	0
W 96	97	2	5	5	0	5	5	0	5	2	5	0	4	0	0
W 97	97	1	5	5	0	5	5	0	5	3	5	0	4	0	0
W 98	97	2	5	5	0	5	5	2	5	2	5	0	4	0	0
W 99	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 100	97	3	5	5	0	5	5	0	5	0	5	0	4	0	0

W 72	97	5	5	5	0	5	5	0	5	2	5	5	4	0	0
W 73	97	1	5	5	0	5	5	0	5	2	5	5	4	0	0
W 74	97	2	5	5	0	5	5	0	5	0	5	5	5	0	0
W 75	97	1	5	5	0	4	5	0	5	0	5	5	4	0	0
W 76	97	0	5	5	0	5	5	0	5	0	5	5	5	0	0
W 77	97	0	5	5	0	5	5	0	5	2	5	5	4	0	0
W 78	97	1	5	5	0	5	5	0	5	0	5	5	4	0	0
W 79	97	2	5	5	0	5	5	0	5	2	5	5	3	0	0
W 80	97	1	5	5	0	5	5	0	5	1	5	1	3	0	0
W 81	97	2	5	5	0	5	5	0	5	2	4	0	5	0	0
W 82	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 83	97	1	5	5	0	5	5	0	5	1	5	0	4	0	0
W 84	97	3	5	5	0	5	5	2	5	0	5	0	4	0	0
W 85	97	1	5	5	0	5	5	0	5	1	5	0	5	0	0
W 86	97	2	5	5	0	3	5	0	5	3	5	0	3	0	0
W 87	97	1	5	5	0	5	5	0	5	2	5	0	3	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W1	96	0	0	5	5	5	0	5	0	0	5				62
W2	96	0	0	5	5	5	0	5	0	0	5				63
W3	96	0	0	5	5	5	0	5	0	0	5				63
W4	96	0	0	5	5	5	0	5	0	0	5				63
W5	96	0	0	5	5	5	0	3	0	0	5				62
W6	96	0	0	5	5	5	0	1	0	0	5				60
W7	96	0	0	5	5	5	0	1	0	0	5				60
W8	96	0	0	5	5	5	0	1	0	0	5				13
W9	96	0	0	5	5	5	0	2	0	0	5				55
W10	96	0	0	5	5	5	0	5	0	0	5				60
W11	96	0	0	5	5	5	0	5	0	0	5				61
W12	96	0	0	5	5	5	0	5	0	0	5				60
W13	96	0	0	5	4	5	0	5	0	0	5				59

W 101	97	0	5	5	0	4	5	1	5	2	5	0	5	0	0
W 102	97	0	5	5	0	5	5	0	5	2	5	0	4	0	0
W 103	97	0	5	5	0	4	5	0	5	2	5	0	5	0	0
W 104	97	0	5	5	0	5	5	0	5	3	5	0	4	0	0
W 105	97	0	3	3	0	3	3	0	3	1	3	0	2	0	0

Analysis of ADA definit actual paid days
For CY 1996 and 1997
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105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W30	96	0	0	0	5	5	0	5	0	0	5				63
W31	96	0	0	0	5	5	0	5	0	0	5				59
W32	96	0	0	0	5	5	0	5	0	0	5				60
W33	96	0	0	0	5	5	0	5	0	0	5				61
W34	96	0	0	0	5	5	0	5	0	0	5				60
W35	96	0	0	0	5	5	0	5	0	0	5				59
W36	96	0	0	0	5	5	0	5	0	0	5				61
W37	96	0	0	0	5	5	0	5	0	0	5				60
W38	96	0	0	0	5	5	0	5	0	0	5				61
W39	96	0	0	0	5	5	0	5	0	0	5				62
W40	96	0	0	0	5	5	0	5	0	0	5				62
W41	96	0	0	0	5	5	0	5	0	0	5				62
W42	96	0	0	0	5	5	0	5	0	0	5				61

W14	96	0	0	5	5	5	0	5	0	0	5				60
W15	96	0	0	5	5	5	0	5	0	0	5				61
W16	96	0	0	5	5	5	0	5	0	0	5				60
W17	96	0	0	4	5	5	0	5	0	0	5				62
W18	96	0	0	5	5	5	0	5	0	0	5				64
W19	96	0	0	5	5	5	0	5	0	0	5				62
W20	96	0	0	5	5	5	0	5	0	0	5				68
W21	96	0	0	5	5	5	0	5	0	0	5				66
W22	96	0	0	5	5	5	0	5	0	0	5				68
W23	96	0	0	0	5	5	0	5	0	0	5				68
W24	96	0	0	0	5	5	0	5	0	0	5				65
W25	96	0	0	0	5	5	0	5	0	0	5				66
W26	96	0	0	0	5	5	0	5	0	0	5				63
W27	96	0	0	0	5	5	0	5	0	0	5				62
W28	96	0	0	0	5	5	0	5	0	0	5				64
W29	96	0	0	0	5	5	0	5	0	0	5				61

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W 59	97	0	0	0	5	5	5	5	0	0	5				68
W 60	97	0	0	0	5	5	5	5	0	0	5				67
W 61	97	0	0	0	5	5	5	5	0	0	5				65
W 62	97	0	0	0	5	5	5	5	0	0	5				69
W 63	97	0	0	0	5	5	5	5	0	0	5				64
W 64	97	0	0	0	5	5	5	5	0	0	5				67
W 65	97	0	0	0	5	5	5	5	0	0	5				66
W 66	97	0	0	0	5	5	1	5	0	0	5				67
W 67	97	0	0	0	5	5	0	5	0	0	5				61
W 68	97	0	0	0	5	5	0	5	0	0	5				63
W 69	97	0	0	0	5	5	0	5	0	0	5				63
W 70	97	0	0	0	5	5	0	5	0	0	3				59
W 71	97	0	0	0	5	5	0	5	0	0	0				59

51

W43	96	0	0	0	5	4	0	5	0	0	5				61
W44	96	0	0	0	5	5	0	5	0	0	5				61
W45	96	0	0	0	5	5	0	5	0	0	5				61
W46	96	0	0	0	5	5	0	5	0	0	5				60
W47	96	0	0	0	5	5	0	5	0	0	5				59
W48	96	0	0	0	5	5	0	5	0	0	5				62
W49	96	0	0	0	5	5	0	5	0	0	5				61
W50	96	0	0	0	5	5	0	5	0	0	5				64
W51	96	0	0	0	5	0	0	5	0	0	5				57
W52	96	0	0	0	5	0	0	5	0	0	5				57
W53	96&97	0	0	0	5	0	2	5	0	0	5				59
W54	97	0	0	0	5	5	5	5	0	0	5				69
W55	97	0	0	0	5	5	5	5	0	0	5				66
W56	97	0	0	0	5	5	5	5	0	0	5				66
W57	97	0	0	0	5	5	5	5	0	0	5				66
W58	97	0	0	0	5	5	5	5	0	0	5				65

50

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

		15	16	17	18	19	20	21	22	23	24				TOTALS
W 88	97	5	0	0	5	5	0	5	5	0	0				61
W 89	97	5	0	0	5	5	0	5	5	0	0				61
W 90	97	4	0	0	5	5	0	5	5	0	0				59
W 91	97	5	0	0	5	5	0	5	5	0	0				61
W 92	97	5	0	0	5	5	0	5	5	0	0				55
W 93	97	5	0	0	5	5	0	5	5	0	0				54
W 94	97	5	0	0	5	5	0	5	5	0	0				64
W 95	97	5	0	0	5	5	0	5	5	0	0				64
W 96	97	5	0	0	5	5	0	5	5	0	0				63
W 97	97	5	0	0	5	5	0	5	5	0	0				63
W 98	97	0	0	0	5	5	0	5	5	2	0				60
W 99	97	0	0	0	5	5	0	5	5	5	0				61
W 100	97	0	0	0	5	5	0	5	5	5	0				62

W 72	97	0	0	0	5	5	0	5	0	0	0				61
W 73	97	0	0	0	5	5	0	5	5	0	0				62
W 74	97	0	0	0	5	5	0	5	5	0	0				62
W 75	97	0	0	0	5	5	0	5	5	0	0				60
W 76	97	0	0	0	5	5	0	5	5	0	0				60
W 77	97	0	0	0	5	5	0	5	5	0	0				61
W 78	97	0	0	0	5	5	0	5	5	0	0				60
W 79	97	0	0	0	5	5	0	5	5	0	0				58
W 80	97	0	0	0	5	5	0	5	5	0	0				55
W 81	97	0	0	0	5	5	0	5	5	0	0				59
W 82	97	0	0	0	5	5	0	5	5	0	0				56
W 83	97	0	0	0	5	5	0	5	2	0	0				53
W 84	97	0	0	0	5	5	0	5	5	0	0				59
W 85	97	5	0	0	5	5	0	5	5	0	0				62
W 86	97	5	0	0	5	5	0	5	5	0	0				61
W 87	97	5	0	0	5	5	0	5	5	0	0				61

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

				Majority Pd in wk include											
				Freeman											
W1	96			13											
W2	96			15											
W3	96			14											
W4	96			14											
W5	96			15											
W6	96			15											
W7	96			15											
W8	96			13											
W9	96			15											
W10	96			13											

W 101	97	0	5	0	5	5	0	5	5	5	0				67
W 102	97	0	5	0	5	5	0	5	5	5	0				66
W 103	97	0	5	0	5	5	0	5	5	5	0				66
W 104	97	0	5	0	5	5	0	5	5	5	0				67
W 105	97	0	3	0	3	3	0	3	3	3	0				39

Note: 1=Klecan, 2=Andrews, 3=Baker, 4=DeFrancesco, 5=Dickson, 6=Dupell, 7=Freeman, 8=Gilliland 9=Gilman, 10=Harvey, 11=Haskins, 12=Heusch, 13=, 14= Korshoj, 15=Lang, 16=Libbey, 17= Lorenz, 18= Pimental, 19=Poot, 20=Smith, 21=Steven-son, 22=Thomas, 23=Williams, 24=Wells.

Analysis of ADA definit actual paid days
For CY 1996 and 1997
#REF!
105 Weeks Summary of and Analysis Methods
No. of Days Paid

				Majority pd in wk include											
				Freeman											
W30	96			13											
W31	96			14											
W32	96			13											
W33	96			14											
W34	96			13											
W35	96			14											
W36	96			13											
W37	96			13											
W38	96			13											
W39	96			13											
W40	96			14											

W11	96			13											
W12	96			13											
W13	96			13											
W14	96			13											
W15	96			15											
W16	96			13											
W17	96			14											
W18	96			14											
W19	96			14											
W20	96			15											
W21	96			15											
W22	96			15											
W23	96			15											
W24	96			14											
W25	96			14											
W26	96			14											
W27	96			13											
W28	96			14											
W29	96			13											

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				Majority pd in wk include											
				Freeman											
W 59	97			14											
W 60	97			15											
W 61	97			14											
W 62	97			14											
W 63	97			14											
W 64	97			15											
W 65	97			14											
W 66	97			15											
W 67	97			14											
W 68	97			14											
W 69	97			15											

W41	96			14											
W42	96			13											
W43	96			14											
W44	96			14											
W45	96			14											
W46	96			13											
W47	96			13											
W48	96			13											
W49	96			13											
W50	96			14											
W51	96			12											
W52	96			12											
W53	96&97			13											
W54	97			15											
W55	97			14											
W56	97			15											
W57	97			15											
W58	97			14											

Analysis of ADA definit actual paid days
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				Majority pd in wk include											
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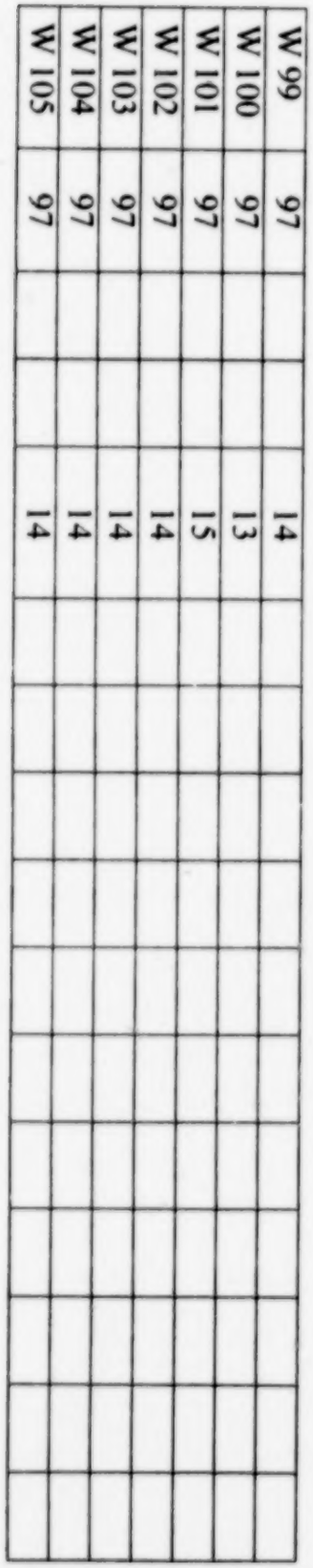
W 88	97			13											
W 89	97			14											
W 90	97			14											
W 91	97			15											
W 92	97			12											
W 93	97			13											
W 94	97			14											
W 95	97			14											
W 96	97			14											
W 97	97			14											
W 98	97			14											

W 70	97			14											
W 71	97			14											
W 72	97			13											
W 73	97			14											
W 74	97			13											
W 75	97			13											
W 76	97			12											
W 77	97			13											
W 78	97			13											
W 79	97			14											
W 80	97			13											
W 81	97			13											
W 82	97			13											
W 83	97			13											
W 84	97			13											
W 85	97			14											
W 86	97			14											
W 87	97			14											



NO: 99-406-AS
UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

AFFIDAVIT OF CRAIG A. CRISPIN IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Craig A. Crispin, being first duly sworn, depose and say:

1. I am the one of the attorneys representing plaintiff Deborah Anne Wells in the above entitled matter, and I make this Affidavit upon personal knowledge and in support of Plaintiff's Response to Defendant's Motion for Summary Judgment.

2. Attached as Exhibit 1 are true and correct copies of excerpts from the deposition of Deborah Anne Wells taken on August 12, 1999.

3. Attached as Exhibit 2 are true and correct copies of excerpts and deposition exhibits from the deposition of Gale Dupell taken on October 5, 1999.

4. Attached as Exhibit 3 are true and correct copies of excerpts from the deposition of Steven Jon Mason, MD taken on October 5, 1999.

5. Attached as Exhibit 4 are true and correct copies of excerpts from the deposition of Robert Wollmuth, MD taken on October 5, 1999.

Craig A. Crispin

SUBSCRIBED AND SWORN to this 29th day of November before the undersigned notary public.

Notary Public for Oregon

Exhibit 2

[7] Q. Is there anything about you today, such as fatigue, medication, like that that would make it so that you don't have your normal ability to recall and testify?

A. No, there's nothing.

Q. Where are you employed?

A. Clackamas Gastroenterology – Both places. Clackamas Gastroenterology Associates, P C.

Q. That's the – Okay. Is it your understanding that the formal title of your employer is Clackamas Gastroenterology, P C?

A. Associates, P C.

Q. Associates, P C. That suggests to me it's a professional corporation.

A. Correct.

Q. You heard testimony it was a partnership a few minutes ago.

A. I think the physicians think of themselves as partners in organizations.

Q. So the entity actually is a professional corporation, and the five doctors are shareholders in that corporation?

A. Correct.

* * *

[3]Q. Do you know whether or not it ever was a partnership?

Q. Can you give me a summary of your duties?

A. Basically, I'm responsible for all non medical aspects of the practice.

Q. Does that include management of personnel?

A. Management of personnel, all operations, basically anything that doesn't require direct patient care. It does include supervising the nurses at the surgery center, but not determining their medical skills.

Q. It does not include management of the physician employees?

A. It does, actually, have a role in that, making sure that the physicians are in compliance with the standards we've established. They do officially report to me as employees.

Q. And Dr. Wollmuth is correct that the five physicians are in fact employees of the corporation?

A. That's correct.

Q. As of right now, how many other employees are employed by Clackamas GI? What's your total head count?

A. Somewhere close to 20, but I'm not sure exactly. We have a lot of part-time people, and - - I mean I can look it up.

Q. The number 20, is that an FTE or is that number of bodies?

* * *

[37]A. No. I mean I see dates here, but I don't

personally know.

Q. You do know that you received it prior to May 12th?

A. Yes.

Q. So you knew that Ms. Wells was authorized by her attending physician to be off work through May 12, 1997?

A. Correct. Although I had originally misread it as to May 12.

Q. It in fact does say through May 12, doesn't it?

A. I see that.

Q. Going back to Exhibit 114, your May 6, 1997 letter, did you draft this letter on May 6th?

A. The letter would be dated whatever date I was mailing it. If I had done a draft a prior day, I would have revised the date to the date it was mailed, so I don't know. It could have all been done in one day.

Q. The second page of Exhibit 114, was that enclosed with your letter dated May 6?

A. Yes, the Cobra form.

Q. And you put on the third line employment termination date May 12, 1997.

A. Uh-huh (affirmative response).

[38]Q. Is that your handwriting?

A. Yes, it is.

Q. Did you understand or – Let's put it this way, did you have an expectation as of May 6, 1997 that Ms. Wells would be terminated on May 12, 1997?

A. Yes.

Q. Can you tell me what entered into your expectation?

A. Because she had filed for disability insurance, that it didn't take place until after two weeks of leave, that, to me, was her way of notifying us that she wouldn't be returning.

Q. At any point in time did Ms. Wells orally tell you that she did not intend to return?

A. No. Despite our policy being to call in, she had not called in at all.

Q. At any point in time did Ms. Wells inform you in writing that she would not be returning to work?

A. No.

Q. Didn't you interpret the medical release that you have there, Exhibit 112, the April 28, 1997 release, as indication that she would not be at work from April 25th through May 12th?

A. I had misread it as to.

Q. I understand.

Exhibit 114 to Depositin of Gale Dupell

Mr. Debbie Wells
16601 S. Archer Drive
Oregon City, OR 97045
May 6, 1997

Dear Debbie,

This letter includes the information that you want for your disability insurance claim form. Since you have requested this information, are you planning on returning to work May 12th as your medical release states? Due to the hardship your absence is placing on the company, we will have to terminate your employment if you do not return full-time next Monday.

If you do not return on the 12th, then you would owe $517.72 for the difference between the paid estimated hours and actual/accrued hours. In addition, you have not sent in the $219.20 you received in error with your April 30 direct deposit paycheck. Since you may be unable to work due to an on-going medical condition, we will wave repayment of these amounts; it you do not return.

On May 12th, if you do not arrive, we will be notifying the various insurance plans that you no longer work here. The COBRA form is enclosed which you will use to either elect to continue your medical coverage or not to continue it. Send the completed from directly to John Alden Life Insurance Co. at the address on the form. If you wish to continue coverage past May 31, 1997, send a check to us for $226.61 by the 20th of each month starting in May.

The following information covers the relevant questions

on the Unum Disability Claim form. Your are a full-time employee working Monday through Friday from 8:00 am until 5:00 pm. Your job title is Patient Coordinator. The last day you came to work was April 24th. Your doctor has provided a Report of Disability related to your on-going medical problems. Your current gross wage is $ 1 3.70 per hour with your last increase being a COL one effective January 1, 1 997. You are a participant in our Pension and Profit Sharing Plans. You have been paying for the short tem disability plan on an after tax basis.

Sincerely,

Gale R. Dupell, M.B.A.
Administrator

Exhibit 4

practice our subspecialty of gastroenterology in the south Portland area.

Q. Who are the five partners?

A. Myself, Dr. John Mason, Dr. Mike Sheffield, Dr. Will Ferrin, and Dr. Mark Sheffield.

Q. Now, are the four partners – Is it a partnership you say?

A. Five partners.

Q. Are the partners employees of the partnership?

A. Yes.

Q. Under employment agreements of some kind?

A. Yes.

Q. How many offices or clinics does the partnership operate?

A. We have two full-time offices and two part-time offices.

Q. You refer to them as offices rather than clinics or hospitals or -

A. Clinics, yeah.

Q. Two full time and two part time?

A. Yes.

Q. Can you describe for me what it means to have a part-time clinic?

A. We rent space for several part days a week or one part day a week, and otherwise we're not there and

Ms. Debbie Wells
16601 S. Archer Drive
Oregon City, OR 97045
May 6, 1997

Dear Debbie,

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The following information covers the relevant questions on the Unum Disability Claim form. Your are a full-time

employee working Monday through Friday from 8:00 am until 5:00 pm. Your job title is Patient Coordinator. The last day you came to work was April 24th. Your doctor has provided a Report of Disability related to your on-going medical problems. Your current gross wage is $13.70 per hour with your last increase being a COL one effective January 1, 1997. You are a participant in our Pension and Profit Sharing Plans. You have been paying for the short tem disability plan on an after tax basis.

Sincerely,
Gale R. Dupell, M.B.A.
Administrator

(Certificate or affidavit of service omitted in printing).

NO: 99-406-AS
UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEBORAH ANNE WELLS
Plaintiff,

V

CLACKAMAS GASTROENTEROLOGY ASSOCIATES,
P.C. an Oregon corporation,
Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S CONCISE STATEMENT OF MATERIAL FACTS

Plaintiff responds to defendant's Concise Statement of Material Facts as follows:

1. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 1.

2. Plaintiff disputes defendant's paragraph 2. When defendant's shareholder employees are included, defendant consistently employs from 18 to 19 employees. Gale Dupell Dep. Tr. 13; Robert Wollmuth M.D. Dep. Tr. 7

3. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 3.

4. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 4.

5. Plaintiff disputes that portion of defendant's paragraph 5 which claims certain enumerated duties were essential duties of the position. Dupell Dep. Tr. 58, 63-64, 65. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute that the certain enumerated duties were performed by plaintiff.

6. Plaintiff disputes defendant's paragraph 6. Plaintiff had no input into the creation of the job description. Wells Dep. Tr. 108.

7. Plaintiff disputes defendant's paragraph 7. Wells Dep. Tr. 15-16, 22-24, 28. Plaintiff also objects to defendant's paragraph 7 because it is misleading and factually unfounded. The citation upon which defendant relies does not support the contention contained within this paragraph, and it is otherwise disputed by plaintiff. Wells Dep. Tr. 36-38.

8. For purposes oft his response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 8, but alleges it is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

9. Plaintiff disputes defendant's paragraph 9. See ¶ 26 infra. Plaintiff also objects to defendant's paragraph 9 because it is misleading and factually unfounded. The citation upon which defendant relies does not support the contention contained within this paragraph, and it is otherwise disputed by plaintiff.

10. Plaintiff objects to defendant's paragraph 10 because it is a legal conclusion. Plaintiff also disputes defendant's paragraph 10. Dupell Dep. Tr. 65-66. Plaintiff alleges also that defendant's reference to "hiring an additional person" is not consistent with plaintiffs request for accommodation and is therefore irrelevant.

11. Plaintiff disputes defendant's paragraph 11, and alleges that on April 24, 1997 defendant ordered plaintiff to its Tualatin office, with the knowledge and expectation that plaintiff would be unable to perform the work at such location and with the purpose of forcing plaintiff to quit. See ¶¶ 28, 29 infra. Plaintiff also objects to defendant's paragraph 11 on the ground that the contention is misleading and unsupported by the citations provided by defendant.

12. Plaintiff denies defendant's paragraph 12. See ¶ 28 infra. To the extent defendant acted on the belief such position was less stressful, it had no medical support for its decision. Dupell Dep. Tr. 51.

13. Responding to defendant's paragraph 13, plaintiff agrees that she declined the transfer to defendant's Tualatin office, in part because it was humiliating and in part because she was physically unable to make the drive to the Tualatin office. Wells Dep. Tr. 46, 48-49, 85-86.

14. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 14, but alleges that whether or not plaintiff "offered to return to work" is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

15. For purposes of this response to defendant's

Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 1 5, but alleges it is not relevant to any issue in the case and inadequate to establish any relevant or material fact.

16. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 16.

17. Plaintiff disputes defendant's paragraph 17. Defendant received by fax a copy of a medical release from plaintiff's physician. Wells Dep. Tr. 79-80.

18. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 18, but alleges it is not relevant and is inadequate to establish any relevant or material fact.

19. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 19, but alleges that she did not return to work on such dates due to her protected medical leave and the discriminatory acts of defendant. Wells Dep. Tr. 66-67, 79-80.

20. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff does not dispute defendant's paragraph 20, but alleges that plaintiff could have continued in her position with defendant had it provided reasonable accommodation. Wells Dep. Tr. 66-67; 79-80.

21. For purposes of this response to defendant' s Motion for Summary Judgment, plaintiff agrees that she submitted a letter to Unum Insurance Company dated August 13, 1997 in which she stated that she was unable,

at that time, to work. Plaintiff disputes any inference otherwise intended by defendant' s paragraph 2 1. See ¶ 22 infra.

22. For purposes of this response to defendant's Motion for Summary Judgment, plaintiff agrees that her attending physician wrote a letter stating that — at that time — plaintiff was unable to work. Plaintiff denies that any inference can be drawn that plaintiff was unable to work at the time of the discriminatory acts alleged in this action or at any later time. Wells Dep. Tr. 91-92.

Plaintiff alleges the following facts:

23. Defendant left to plaintiff the priorities to be given to plaintiff's various duties, with instructions to attend to matters with deadlines first, Collections work had no deadlines. Wells Dep. Tr. 15-16.

24. Collections were affected by installation of a new computer system, which caused a delay in billing of approximately 9 months. Wells Dep. Tr. 16-17.

25. Defendant instructed plaintiff to work on collections as a higher priority in October 1996. By December, defendant informed plaintiff she was doing a good job on collections. Wells Dep. Tr. 20, 28.

26. Plaintiff requested reasonable accommodation for the effects of her disability numerous times. These requests included requests for assistance from another of defendant's employees in the performance of plaintiff's growing work load, requests that defendant stop assigning plaintiff to relief receptionist duties, and an adjustment in working hours. Wells Dep. Tr. 22-23, 23-24, 35-36, 37-38, 38-39, 41-42, 43, 58-59, 62, 65.

27. Defendant provided extra assistance to other employees, but refused to provide assistance to plaintiff. Wells Dep. Tr. 5 1 . Defendant adjusted plaintiff's work hours, but refused to continue such adjustment after April 25, 1997. Wells Dep. Tr. 53-54. Defendant continued to assign plaintiff to relief receptionist duties. Wells Dep. Tr. 4 1-45 . Defendant responded to plaintiff's requests for accommodation by demoting her to a receptionist position at its Tualatin office. Wells Dep. Tr. 43-45, 47-49.

28. On April 24, 1997, defendant informed plaintiff that she would be henceforth assigned to defendant's Tualatin office. Wells Dep. Tr. 43-45. Defendant had knowledge that plaintiff's disability prevented her from working at the Tualatin office due to the required late-afternoon work and stressful commute. Wells Dep. Tr. 36, 48-49, 53-54.

29. When plaintiff protested the assignment to Tualatin due to her inability to work without defendant's accommodations for her disability, defendant's Gale Dupell indicated her desire that plaintiff quit her employment. Wells Dep. Tr. 53, 57, 58-59, 65.

30. Plaintiff suffered disabling symptoms as a result of defendant's discriminatory effort to transfer her to Tualatin, and scheduled a medical appointment for April 28, 1997, pending which she did not report to work. Defendant was notified of plaintiff's medical status. Wells Dep. Tr. 71, 73; Dupell Dep. Tr. 35.

31. Plaintiff's physician released plaintiff from work through May 12, 1997 by notice to the employer. Wells Dep. Ex. 11; Dupell Dep. Tr. 35, Ex. 112.

32. Defendant expected to terminate plaintiff on May

12, 1997 as early as May 6, 1997. Wollmuth Dep. Tr. 20. Defendant communicated to plaintiff by letter dated May 6, 1997 that she would be terminated if she did not return to work by May 12, 1997, and further provided COBRA forms to plaintiff containing a termination date of May 12, 1997. Dupell Dep. Tr. 37- 38, Ex.114. Defendant acknowledges that plaintiff's authorized medical release extended to May 13, 1997. Dupell Dep. Tr. 37.

33. On May 12, 1997, plaintiff faxed to defendant a new medical release taking her off work from May 12, 1997 through June 16, 1997. Defendant received the extended release from work on May 12, 1997. Wells Dep. Tr. 79-80; Dupell Dep. Tr. 41, Ex. 113 p.2.

34. Defendant's policies provided 40 hours of sick leave per year. Those policies did not place a maximum on vacation accrued per year, and plaintiff was entitled to approximately 20 days of vacation time in 1997. Dupell Dep. Ex. 101 p.5; Wollmuth Dep. Tr. 43. Defendant covered for other absences by hiring temporary employees. Dupell Dep. Tr. 65-66. Defendant also did not fill plaintiff's position for several weeks after it claims it terminated her. Dupell Dep. Tr. 65-66.

35. By no later than May 16, 1997, defendant had received a medical report dated April 28, 1997 from plaintiffs physician describing plaintiffs temporary disability and symptoms. Dupell Dep. Tr. 47, ex. 115. As of May 16, 1997, defendant had not taken any action or completed any forms terminating plaintiffs employment. Dupell Dep. Tr. 46-47.

36. Defendant claims to have made the decision that plaintiff was no longer employed as early as May 12, 1997. Wollmuth Dep. Tr. 44-45; Steven Mason, M.D. Dep.

Tr. 15.

37. Plaintiff could have continued to work in her position with defendant had defendant provided reasonable accommodation and had defendant not exacerbated her physical condition by its discriminatory acts. Wells Dep. Tr. 106-07. Plaintiff was released to work the end of August 1997. Wells Dep. Tr. 92. She began work for Bend Memorial Clinic, doing bookkeeping and payroll, in October 1998 and continues in employment with that clinic. Wells Dep. Tr. 101.

CRISPIN & ASSOCIATES

By:_____
Craig A. Crispin, OSB No. 82485
Of Attorneys for Plaintiff

(Certificate or affidavit of service omitted in printing).

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed March 22, 2000

FINDINGS AND RECOMMENDATION

ASHMANSKAS, Magistrate Judge:

Plaintiff Deborah Wells brings this action against defendant Clackamas Gastroenterology Associates, P.C., her former employer. Plaintiff brings claims under the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 seq. and O.R.S. § 659.436, alleging that defendant unlawfully discriminated against her by refusing to reasonably accommodate her alleged disability and by terminating her employment. She also brings a claim for wrongful discharge. Presently before the court is defendant's motion for summary judgment.

STANDARDS

Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law Fed. R. Civ. P.

56(c). The moving party must show the absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1936). The moving party must support the summary judgment motion with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to set forth all material facts required for summary judgment. Id. If the moving party adequately supports the motion, the adverse party may not rest upon the pleading, but must respond with affidavits made on personal knowledge, pleadings, depositions, answers to interrogatories or admissions by party opponents sufficient to demonstrate a genuine issue for trial. Id. at 322-23.

Reasonable doubts regarding the existence of a genuine issue of material fact arc resolved against the moving party. United States ex. Rel. Anderson v. Northern Telecom, Inc., 52 F.3d 810, 815(9th Cir. 1995). Inferences drawn from facts are viewed in the light most favorable to the non-moving party. Id.

A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir. 1989), cert. denied, 493 U.S. 809 (1989). No genuine issue for trial exists where the record as a whole could not lead the trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The substantive law governing a claim determines whether a fact is material. Anderson v, Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Only disputes over facts that are relevant to an element of a claim or defense or whose existence might affect the outcome of the suit

will properly preclude the entry of summary judgment. Id.

DISCUSSION

Defendant moves for summary judgment arguing, among other things, that defendant was not covered by the ADA during the relevant time period.

Under the ADA, it is illegal for a "covered entity" to discriminate against a qualified individual with a disability. 42 U.S.C. § 12112(a). An "employer" is one type of "covered entity." 42 U.S.C. § 12111(2). An "employer" must have 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 1211 1(5)(A). An "employee" is defined as "an individual employed by an employer." 42 U.S.C. § 12111(4). Thus, in order for defendant to be covered by the ADA, it must have had 15 or more employees for 20 or more weeks during 1996 or 1997.

During the relevant time period, defendant was a professional corporation with four physician shareholders. It is undisputed that if the physician shareholders are not counted, defendant had 15 employees for only 10 weeks in 1996 and for only 8 weeks in 1997. In such a case, defendant would not be a "covered entity." Thus, the issue before the court is whether the physician shareholders of a professional corporation are "employees" under the ADA.

Plaintiff urges that a different test should be used to determine who is an employee under the ADA, depending upon whether the inquiry is coverage or the right to sue. I disagree. The ADA contains only one definition of "employee," and no indication that a different test should be used for coverage and the right

to sue. Also, if different definitions were used, inconsistent results would be possible an individual who finds himself an "employee" for purposes of coverage, but with no right to sue, or vice versa). My conclusion is buttressed by an unpublished opinion from the Ninth Circuit that used the economic realities test[1] to differentiate between an employee and independent contractor for purposes of coverage under federal employment discrimination laws. Miller v. Lifestyle Creations, Inc., 993 F.2d 883, 1993 WL 173724 (9th Cir. 1993).

It is generally accepted that those who are properly classified as partners are not "employees" for purposes of the antidiscrimination statutes. See, Hishon v. King& Spaulding, 467 U.S. 69, 79 (1984); Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977). It is also generally accepted that corporate employees are employees under antidiscrimination statutes. See, e.g., Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 213 (S.D.N.Y. 1993). However, the status of a shareholder in a professional corporation remains unsettled because its organizational structure is somewhere between a partnership and a regular corporation.

The Ninth Circuit has not addressed the specific issue of whether the shareholders of a professional corporation are employees for purposes of the antidiscrimination laws. It has, however, looked at the issue of whether under some circumstances a partner can be an employee. In Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (1996), the Ninth Circuit considered whether a physician labeled as a partner can be considered an employee for purposes of bringing suit under federal employment discrimination laws. The court found that, in determining whether a partner can be an "employee,"

the court must

> analyze the true relationship among partners, including the method of compensation, the "partner's" responsibility for partnership liabilities, and the management structure and the "partner's" role in that management, to determine if an individual should be treated as a partner or an employee for the purpose of employment discrimination laws.

79 F.3d at 867.

In Strother, the medical partnership in which plaintiff was a partner had 2400-2500 partners. The affairs of the partnership were conducted predominantly by a board of directors, over which the plaintiff had little control and to which she had limited access. Her compensation was determined by her performance, and she could be disciplined for poor performance. Thus, the court remanded to the district court, finding that plaintiff must be given the opportunity to demonstrate that "her actual partnership rights are limited enough that she should be characterized as an employee." 79 F.3d at 868.

Other circuits have looked at the specific issue of whether shareholders in a professional corporation are "employees" for purposes of the antidiscrimination laws, and have come to differing conclusions. For example, in Equal Employment Opportunity Commission v, Dowd & Dowd. Ltd.. 736 F.2d 1177 (7th Cir. 1984), the court applied an economic realities test and determined that shareholders in a professional corporation engaged in the practice of law are not employees for purposes of federal employment discrimination laws. The court

concluded that the role of a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to a shareholder of a general corporation. Id. at 1178. The court found that the economic reality of a professional corporation is that the management, control and ownership of the corporation is much like the management, control and ownership of a partnership. Id.

However, in Hyland v. New Haven Radiology Associates, 794 F.2d 793 2nd Cir. 1986), the district court applied an economic realities test and determined that the physician shareholders in a professional corporation were not employees for purposes of the federal employment discrimination laws. The circuit court reversed, and found the physician shareholders to be employees. The circuit court's position was that once the physicians had chosen a form of business organization (i.e., professional corporation), they were precluded from arguing that their corporation was essentially a medical partnership among co-equal physicians. Id. at 798. The court held that use of the corporate form precludes any examination designed to determine whether the entity more closely resembles a partnership. Id.

I find that the Dowd case is a better reasoned approach in that it exalts substance over form. With business entities evolving rapidly beyond the standard traditional forms (for example, the new limited liability companies and limited liability partnerships), the question of who is an employee will have to be looked at on the basis of economic realities, because the labels will not answer the question. Further, the Dowd approach is consistent with the approach set out in the Ninth Circuit's analysis in Strother for the distinction between a true partner and an employee.

Strother directs the court to Look at the true relationship among the individuals, including the method of compensation, the responsibility for the entity's liabilities, and the management structure and role in that management, to determine if an individual should be treated as an employee for the purpose of employment discrimination laws. This is in effect an economic realities test.

The record in this matter indicates that the four physician shareholders of defendant constitute the board of directors. They own the professional corporation, and control the management and operations of the medical practice. They each share in the profits of the professional corporation by annual bonuses. Under Oregon law, they remain personally liable for malpractice claims against them, but have limited liability with respect to corporate obligations.

I conclude that the role of the four shareholders in the defendant professional corporation is that of employers who own and manage their own business. The economic reality is that they are more analogous to partners in a partnership than to shareholders in a general corporation. I conclude that the four physician shareholders are not employees for purposes of the federal antidiscrimination laws. Therefore, I recommend that defendant's motion for summary judgment with respect to the ADA coverage issue granted. There are no genuine issues of material fact. Defendant's physician shareholders are not employees for purposes of the ADA and, thus, the professional corporation is not covered by the ADA.

SUPPLEMENTAL JURISDICTION

28 U.S.C. § 1367, which applies to cases commenced

after December 1, 1990, provides the basis for supplemental jurisdiction:

> Except as otherwise provided in subsection (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over ali other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

Subsection (c) of 28 U.S.C. § 1367 gives the court discretion to "decline to exercise" tile supplemental jurisdiction in various circumstances including when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The comments to the rule note;

Whether a dismissal of the touchstone claim should bring about a dismissal (or remand, in a removal situation) of the dependent claim for want of supplemental jurisdiction should hinge on the moment within the litigation when the dismissal of the touchstone claim takes place. . . . If for example, the main claim is dismissed early in the action, befcre any substantial preparation has gone into dependent claims, dismissing or remanding the latter upon declining supplemental jurisdiction seems fair enough.

28 U.S.C.A. § 1367, p. 224 (West Supp. 1991).

In this case, I use my discretion to decline to exercise supplemental jurisdiction over plaintiff's pendent state law claims since it is early in the case and no substantial preparation (other than that necessary to the ADA claim) has gone into the pendent state law claims. Thus, I recommend that plaintiffs pendent state law claims be dismissed without prejudice.

CONCLUSION

Defendant's motion (# 9) for summary judgment, with respect to plaintiff's First Claim for Relief; should be GRANTED. The remainder of defendant's summary judgment motion should be DENIED as moot. Plaintiff's Second and Third Claims for Relief should be DISMISSED without prejudice.

DATED this 22, day of March 2000.

DONALD C, ASHMANSKAS
United States Magistrate Judge

SCHEDULING ORDER

Objections to these Findings and Recommendation(s), if any, are due April 5, 2000. If no objections are filed, the Findings and Recommendation(s) will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than April 19, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation(s) will be referred to a district court

judge and go under advisement.

Footnote

[1] The Ninth Circuit uses the "economic realities" test to determine employee status. Lutcher v. Musician Union Local 47, 633 F.2d 880, 883 (9th Cir. 1980).

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed May 5, 2000

ORDER

Magistrate Judge Donald C. Ashmanskas filed his Findings and Recommendation on March 22, 2000. The matter is now before me pursuant to 26 U.S.C. § 636(b) (1) (B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b) (1) (C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a novo review. I ADOPT Magistrate Judge Ashmanskas's Findings and Recommendation. Defendant's motion (#9) for summary judgment, with respect to plaintiff's First Claim f or Relief, is granted. The remainder of defendant's

summary judgment motion is denied as moot. Plaintiff 's Second and Third Claims for Relief are dismissed without prejudice.

IT IS SO ORDERED.

DATED this 5, day of May, 2000.

OWEN M. PANNER
U.S. DISTRICT COURT
JUDGE

Civil No. 99-406-AS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DEBORAN ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES PC,
an Oregon corporation,
Defendants.

Filed June 2, 2000

JUDGMENT OF DISMISSAL

OWEN M. PANNER, District Judge:

Consistent with the Order (# 43) of this court, filed May 5, 2000, adopting the Findings and

Recommendation (# 37) by U.S. Magistrate Judge Donald C. Ashmanskas, filed March 22, 2000, IT IS ORDERED and ADJUDGED that Plaintiff's case is DISMISSED with prejudice.

Pending motions, if any, are DENIED as moot.

DATED this 31, day of May 2000.

OWEN M. PANNER
U.S District Court Judge

No. 99-406-AS

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

DEBORAH ANNE WELLS,
Plaintiff,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant.

6/7/2000

PLAINTIFF'S NOTICE OF APPEAL

Notice is hereby given that Deborah Anne Wells, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Findings and Recommendations entered in this case on March 22, 2000, and affirming Order entered on May 5, 2000, copies of which are attached

Dated this 2nd day of June, 2000.

Crispin & Associates

Craig A. Crispin, OSB No. 82485
Shelley D. Russell, OSB No. 94068
Of Attorneys for Plaintiff Susan Farmer
Telephone 503-293-5770

No. 00-35545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBORAH ANNE WELLS,
Plaintiff-Appellant,

v.

CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C.,
an Oregon Corporation,
Defendant-Appellee.

September 13, 2001, Argued and Submitted, Portland, Oregon

November 26, 2001, Filed

COUNSEL:
Craig A. Crispin, Portland, Oregon, for the plaintiff-appellant.

Steven W. Seymour, Portland, Oregon, for the defendant-appellee.

JUDGES:
Before: David R. Thompson, A. Wallace Tashima, and Susan P. Graber, Circuit Judges. Opinion by Judge Tashima; Dissent by Judge Graber.

OPINION BY:
A. Wallace Tashima

OPINION:

TASHIMA, Circuit Judge:

Plaintiff-Appellant Deborah Anne Wells appeals from the order of the district court granting summary judgment in favor of Defendant-Appellee Clackamas Gastroenterology Associates, P.C. (Clackamas) on her claim under the Americans With Disabilities Act of 1990 (ADA). The district court held that Clackamas was not an "employer," and therefore not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees during the relevant time periods. We must decide whether Clackamas' physician-shareholders were "employees" within the meaning of the ADA. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we reverse.

I. BACKGROUND

Wells was an employee of Clackamas, an Oregon professional corporation, from 1986 until her termination in May 1997. During the relevant time period, four physician-shareholders, all of whom participated in the management and operations of the medical practice, were the shareholders and directors of Clackamas. In addition to the physician-shareholders, 12-15 other persons were employed by Clackamas during this time period.

When Clackamas terminated Wells' employment, she brought an action against Clackmas alleging unlawful discrimination on the basis of disability under Title I of the ADA, *42 U.S.C. § § 12101*-12117, and Or. Rev. Stat. § § 659.436-659.449. She also brought a claim for common law wrongful discharge.

Clackamas moved for summary judgment against Wells' ADA claim, arguing that it was not an "employer "and, consequently, not a "covered entity," within the meaning of the ADA because it did not have 15 or more employees for the 20 weeks required by the statute. It is

undisputed that if Clackamas' physician-shareholders are not counted as" employees," then it would have had too few employees to qualify as an "employer." On the other hand, if the physician-shareholders are counted as "employees," then the number of employees would have exceeded the number required to bring Clackamas under the coverage of the ADA. Relying on the "economic realities" test, Clackamas argued that its four physician-shareholders should be regarded as "partners" and not as "employees" within the meaning of *42 U.S.C. § 12111*(4) & (5).

The magistrate judge accepted Clackamas' argument and recommended that the court grant the motion for summary judgment on the ADA claim and decline to exercise supplemental jurisdiction over the remaining claims. The district court accepted the recommendations of the magistrate judge in their entirety and entered judgment dismissing the action. Wells timely appeals.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo and must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the district court correctly applied the substantive law. *Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000)* (en banc).

III. DISCUSSION

Whether shareholders of a professional corporation who are actively engaged in conducting the business of the corporation are "employees" under the ADA is an issue of first impression in this Circuit. Under the ADA, it is unlawful for a "covered entity" to discriminate against a qualified individual with a disability on the basis of that disability. *42 U.S.C. §*

12112(a). The term "covered entity" includes an "employer." Id. § 12111(2). An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." Id. § 12111(5)(A). An "employee" is defined as "an individual employed by an employer." Id. § 12111(4).

No circuit has interpreted these specific provisions of the ADA. There are, however, a number of cases that interpret nearly identical language in other federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act. These same cases also state that their interpretations should apply to all employment discrimination statutes. See e.g., *Serapion v. Martinez, 119 F.3d 982, 985 (1st Cir. 1997)* ("We regard Title VII, ADEA, ERISA, and FLSA as standing in pari passu and endorse the practice of treating judicial precedents interpreting one such statute as instructive in decisions involving another."); *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793,.796 (2d Cir. 1986)* (holding that for the FLSA, Title VII, and the ADEA, "cases construing the definitional provisions of one are persuasive authority when interpreting the others").

In *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984)*, the Seventh Circuit applied an "economic realities" test and concluded that "a shareholder in a professional corporation is far more analogous to a partner in a partnership than it is to the shareholder of a general corporation. " *Id. at 1178.* On this basis, the court concluded that because they are "really" partners, shareholders in professional corporations are not to be counted as employees for purposes of federal employment discrimination law. Id.

This approach was rejected by the Second Circuit in Hyland. In Hyland, the court held that the use of the corporate form, including a professional corporation, "precludes any examination designed to determine whether the entity is in fact a partnership." *794 F.2d at 798.* The incorporators of a professional corporation make a deliberate decision to adopt the corporate form for their business in order to avail themselves of important tax, employee benefit, and civil liability advantages. Id. Having freely made the choice to adopt this form of business organization "they should not now be heard" to say that their firm is "essentially a medical partnership," and not a corporation. Id.

Given the broad purpose of the ADA, see *42 U.S.C. § 12101*, we find Hyland's reasoning to be considerably more persuasive than Dowd's. Because the decision to incorporate is presumably a voluntary one, there is no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it both to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it is like a partnership in order to avoid liability for unlawful employment discrimination. Therefore, following the Second Circuit's reasoning in Hyland, we hold that Clackamas' shareholder-employees should be counted as" employees" under the ADA and "that any inquiry respecting partnership status [is] irrelevant." *Hyland, 794 F.2d at 798.*

Clackamas contends that *Strother v. Southern California Permanente Medical Group, 79 F.3d 859 (9th Cir. 1996)*, directs the court to use the "economic realities test" in this case. Strother, however, is distinguishable from this case and does not address the split between Dowd and Hyland regarding the status of shareholders of a professional corporation. In Strother, a case arising under state law, we held that partners can,

under appropriate circumstances, be deemed to be employees for the purposes of the employment discrimination laws.

It is one thing to apply an "economic realities "test to determine that a nominal partner should, under appropriate circumstances, be considered an "employee" in order to prevent a firm from labeling the bulk of its employees as partners simply to insulate itself from liability for discrimination. It is quite another thing, however, to apply the "economic realities" test in order to classify shareholder-employees of a corporate enterprise as partners. See *Hyland, 794 F.2d at 798.* While the shareholders of a corporation may or may not be "employees," they can never be partners in that corporation because the roles are "mutually exclusive." Id.

In the case at bench, the status of Clackamas' four physician-shareholders as employees is clear. During the relevant time periods, in addition to being shareholders and directors of Clackamas, the four physician-shareholders actively participated in the management and operation of the medical practice and literally were employees of the corporation under employment agreements. Therefore, the physician-shareholders of Clackamas should be regarded as" employees" within the meaning of *42 U.S.C. § 12111*(4) & (5); consequently, Clackamas had a sufficient number of employees to qualify as an "employer" and as a "covered entity" under the statute.

IV. CONCLUSION

Because we conclude that Clackamas' physician-shareholders are employees of the corporation, not partners in it, the district court's grant of summary judgment in favor of Clackamas is reversed and the case

is remanded for further proceedings consistent with this opinion.

REVERSED and REMANDED.

DISSENTBY:
Susan Graber Susan Graber . Graber

DISSENT:

GRABER, Circuit Judge, dissenting:

I respectfully dissent. For three reasons, *EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177 (7th Cir. 1984),* expresses the more persuasive approach in the context of this case:[1] (1) our circuit has cautioned against being governed by labels, rather than realities; (2) a physicians' professional corporation in Oregon has many attributes of a partnership as a matter of law and is not merely an ordinary commercial corporation; and (3) the purpose of the numerical requirement in the ADA is to separate small from large enterprises, not to adhere to the vagaries of tax law or tort liability. Like the district court, I would apply the "economic realities" test and would conclude that Defendant's physician-shareholders were not" employees" within the meaning of the ADA.

1. The Significance of Strother

In *Strother v. Southern California Permanente Medical Group, 79 F.3d 859, 865-68 (9th Cir. 1996),* we held that "partners" can be considered "employees "under a state anti-discrimination statute that borrowed concepts from federal law. There, a partner in a medical partnership consisting of more than 2,000 partners had sued the medical partnership. The district court held that the plaintiff could not maintain the action because she was a partner in the defendant entity and was a

party to its partnership agreement. We reversed, holding that the plaintiff should have an opportunity to prove that she was functionally an employee (for example, had neither the power nor the duty to participate in the management and the control of the defendant firm), rather than a partner in the normal sense. *Id. at 867-68.* We noted, for example, that the defendant entity was controlled by a board of directors over which the plaintiff exercised "little control and to which she [had] limited access." *Id. at 867.*

Although I agree that Strothers is not controlling here, it at least suggests that economic realities are more important than labels. That principle should remain true when the s..oe is on the defendant's foot.

Indeed, even the Second Circuit has backed away a bit from the bright-line test suggested by *Hyland v. New Haven Radiology Assocs., P. C., 794 F.2d 793 (2d Cir. 1986).* In a later case, the Second Circuit observed that, although the shareholders of a professional corporation cannot be considered partners, it does not follow that every such shareholder also is an "employee" of the professional corporation. *EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1538 (2d Cir. 1996).* For example, if a shareholder sits on the board of directors but is not involved in the day-to-day management or operation of the firm, then the shareholder is more akin to an "employer," rather than being an "employee. "Id. This case brought the Second Circuit's approach somewhat closer to the Seventh Circuit's. See *Chavero v. Local 241, 787 F.2d 1154, 1157 (7th Cir. 1986)* (holding that members of the board of directors are not employees unless they "perform traditional employee duties"); *Zimmerman v. N. Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983)* (holding that directors and "unpaid, inactive officers" are not corporate "employees"). In other words, "economic realities" play some role even in

the Second Circuit, and Strother counsels that economic realities should play a major role in the Ninth Circuit.

2. The Nature of This Professional Corporation

A professional corporation has some attributes of an ordinary incorporated business, but it is not identical and retains attributes of a professional partnership. The use of the word "corporation" in both contexts should not constrain our inquiry.

In Oregon, a physicians' professional corporation, like this one, preserves the professional relationship between the physicians and their patients, as well as the standards of conduct that the medical profession requires. Or. Rev. Stat. § 58.185(2). Further, "a shareholder of the corporation is personally liable as if the shareholder were rendering the service or services as an individual" with respect to all claims of negligence, wrongful acts or omissions, or misconduct committed in the rendering of professional services. Or. Rev. Stat. § 58.185(3) (emphasis added). A licensed professional also is jointly and severally liable for such claims, albeit with some dollar limitations. Or. Rev. Stat. § 58.185(4)-(9). Ordinary business corporation rules apply only to other aspects of the entity, apart from the provision of professional services. Or. Rev. Stat. § 58.185(11). A professional corporation's activities must remain consistent with the requirements of the type of license in question, Or. Rev. Stat. § 58.205, and it may merge only with other professional corporations, Or. Rev. Stat. § 58.196, so the provision of professional services – with its attendant liabilities – must remain at the heart of a P.C. like this defendant.[2]

Additional special rules apply to professional corporations that are organized to practice medicine, none of which apply to ordinary business corporations. A majority of the directors, the holders of the majority

of shares, and all officers except the secretary and treasurer must be Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(a)-(c). The Board of Medical Examiners is given express statutory authority to require more than a majority of shares, and more than a majority of director positions, to be held by Oregon-licensed physicians. Or. Rev. Stat. § 58.375(1)(d) & (e). The Board of Medical Examiners also may restrict the corporate powers of a professional corporation organized for the purpose of practicing medicine, beyond the restrictions imposed on ordinary business corporations. Or. Rev. Stat. § 58.379. Lastly, Or. Rev. Stat. § § 58.375 through 58.389 contain impediments to the transfer of shares and other corporate activities.

In short, even without considering the economic realities of this particular P. C., it is apparent that a physicians' professional corporation in Oregon retains important legal aspects of a partnership. On this record, it also is clear that the four physician-shareholders are the Defendant entity's directors, participate in the management and operation of the entity's medical practice, attend monthly management meetings, and share profits from the professional corporation through an annual bonus system. Because they in fact exercised full control over the medical practice, shared profits, and remained jointly and severally liable to patients on medically related claims, the physician-shareholders should be classified as partners, rather than employees.

3. The Reason for the ADA Classification

The apparent reason for limiting the ADA's coverage to entities with 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, *42 U.S.C. § 12111*(5)(A), is to divide larger businesses from smaller ones. Congress decided "to spare very small firms from the potentially crushing expense of mastering the intricacies of the

antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." *Papa v. Katy Indus., Inc., 166 F.3d 937, 940* (7th Cir.) (discussing the congressional purpose" of exempting tiny employers from the antidiscrimination laws," including the ADA), cert. denied, *528 U.S. 1019, 145 L. Ed. 2d 408, 120 S. Ct. 526 (1999)*; see also *Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993)* (recognizing that Congress exempted small employers from the ADEA and Title VII of the Civil Rights Act in order to protect them from "the costs associated with litigating discrimination claims").[3]

The result of the majority's opinion is that Clinic # 1, this defendant, is a "covered entity" for ADA purposes, while Clinic # 2 next door, which is identical in all respects except in its four physicians' decision not to adopt a P.C. format, is not a covered entity. Because the very purpose of the 15-employee threshold is economic, it makes no sense to treat Clinic # 1 and Clinic # 2 differently.

4. Conclusion

In my view, the Ninth Circuit should adopt the majority rule – an "economic realities" test – to determine whether a shareholder in a professional corporation is an" employee" within the meaning of the ADA. As Plaintiff and the panel majority acknowledge, if we applied that test to this case we would have to affirm the judgment of the district court. I therefore dissent from the decision to reverse and remand.

Footnotes

[1] The other circuits that have examined this question have followed the Seventh Circuit's approach in Dowd: *Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80-81 (8th Cir. 1996); Fountain v. Metcalf, Zima & Co., P.A., 925 F.2d 1398, 1400-01 (11th Cir. 1991).* It appears that no circuit other than the Second has adopted the Hyland approach.

[2] In Oregon, the distinction between partnerships of professionals and professional corporations is diminishing further. Oregon is currently phasing in a new set of statutes that will govern all Oregon partnerships after January 1, 2003. 1997 Or. Laws, ch. 775, § 34. Under Or. Rev. Stat. § 67.105(4), the liability of partners in a limited liability partnership of professionals will be governed by professional-corporation law:

> Notwithstanding subsection (3) of this section, the partners of a limited liability partnership who are professionals shall be personally liable in their capacity as partners to the same extent and in the same manner as provided for shareholders of a domestic professional corporation under ORS 58.185 and 58.187 and as otherwise provided in this chapter.

The fact that the law governing business entities is subject to a change that will result in having two differently named business structures share significant common features (as well as the fact that the law of business organizations varies from state to state) is an additional reason to adopt an "economic realities" test instead of one that relies solely on labels.

[3] Additionally, Congress made a judgment about how

large a business has a presumed effect on interstate commerce.

(Certificate or affidavit of service omitted in printing).